

CLIENT ALERT

Employer's Overly-Broad Confidentiality Rule Violates Labor Law

August 5, 2005

Maybe it's the hot weather, but this seems to be the season for courts and administrative agencies to take a close look at seemingly innocuous language in company policies. The latest example of this trend is the National Labor Relations Board's decision in *Cintas Corp.*, 344 NLRB No. 118 (June 30, 2005). There, the NLRB adopted an administrative law judge's finding that the company violated Section 8(a)(1) of the National Labor Relations Act ("the Act") by maintaining the following confidentiality rule in its corporate-wide employee handbook

We honor confidentiality. We recognize and protect the confidentiality of any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters.

The Board, in a panel consisting of Chairman Battista and Members Liebman and Schaumber, agreed with the judge that the rule's unqualified prohibitions of the release of "any information" regarding "its partners" (i.e., employees) could be reasonably construed by employees to restrict discussion of wages and other terms and conditions of employment. On that basis, the Board found the company's maintenance of this rule to violate Section 8(a)(1).

In reaching this result, the Board applied the principles set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB No. 75 (2004). In that case, the Board announced a three-part disjunctive test for determining whether work rules violate Section 8(a)(1) in situations where the rule in question does not explicitly restrict activity protected by Section 7 of the Act. In such cases, the Board will find a violation of Section 8(a)(1) if: (1) employees would "reasonably construe the language to prohibit Section 7 activity;" (2) the rule was promulgated in response to union organizing activity; or 3) the rule has actually been applied to restrict the exercise of Section 7 rights. 343 NLRB No. 75, slip op. at 2 (2004). With very little discussion, the Board in *Cintas* agreed with the judge that the company's rule "could be reasonably construed by employees" to restrict discussion of subjects protected by Section 7. Although not mentioned in the Board's decision, the judge's opinion stressed that the employer had not presented a "legitimate business purpose" for that aspect of the confidentiality rule. The judge also stated the opinion that any ambiguity in the rule must be "resolved against the promulgator."

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Thomas P. Gies

Partner – Washington, D.C.

Phone: +1.202.624.2690

Email: tgies@crowell.com